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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 379

EMILY BAUM, ADMINISTRATRIX OF THE ESTATE OF FLOYD BROWN, DECEASED,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (App. A. of Petition) is reported at 256 F. 2d 753.

QUESTIONS PRESENTED

1. Does the mere assertion of a cause of action under the Federal Employers Liability Act entitle a plaintiff to have the case submitted to a jury, and preclude any judi-

cial determination as to whether there is proof to support the cause?

2. Does the plaintiff establish a prima facie case under the Federal Employers Liability Act by showing that an occupant of defendant's labor camp, provided a safe means of ingress and egress without crossing any tracks, was found dead on the tracks on a non-working day?

STATEMENT OF THE CASE

Petitioner's statement is lengthy and in many respects inaccurate. The evidence is fully and accurately reviewed in the opinion of the Court of Appeals and the petitioner submits the following as a summary of the essential facts in the record:

Decedent was an employee in respondent's labor camp located north of its three track right-of-way in a rural area of Porter County, Indiana (App. 14, 18). Saturday, September 12, 1953, was an off day, when he and other occupants of the camp were free to come and go as they chose without permission. He was last seen alive at about 4:30 A.M. on that date, walking south from the camp toward the tracks, after announcing that he was going fishing (App. 15, 19).

At 11:42 on that morning, his mutilated body was discovered by the engineer of an eastbound train (App. 24). It was located some 300 to 500 feet east of the camp along the south track or eastbound main (App. 12, 13, 20, 21). He had been dead for several hours (App. 12).

The engineer observed a pair of shoes to the south of the track and near the body (App. 24). The Coroner found a shoe underneath a tie-plate some distance to the east of the body, inside the north rail of the eastbound main (App. 13).

The engines of eastbound trains passing the scene prior to the discovery of the body were later examined and no evidence was found that they had been involved in an accident (App. 21, 22, 23). There was no evidence that decedent had been observed upon the tracks during the stated time interval (App. 19).

A cinder roadway paralleled the tracks on the north connecting the camp with public roads to the east and west (App. 21). There was no crossover in the vicinity of the camp (App. 13).

The Court of Appeals held that a verdict for the defendant was properly directed at the close of the plaintiff's case, because there was no evidence of negligence, no evidence as to how the decedent met his death, and no evidence that he was doing anything even remotely connected with his employment.

ARGUMENT

1. The petitioner was not entitled to have her case submitted to a jury because the proofs did not justify with reason the conclusion that employer negligence played any part at all in the decedent's death.

The substance of the petitioner's argument is revealed in bold type and language at the introduction to her statement of the reasons for the allowance of the writ (Petition p. 13). Petitioner charges that the courts below have denied "a right specially set up and claimed by her under the Federal Employers Liability Act . . . to have her case submitted to the jury" on her stated "theory" of negligence.

The principal defect in this statement and in the whole petition is the petitioner's failure to recognize the distinction between a "*theory*" of negligence or liability and

evidence or *proof* of the same. The petitioner apparently contends that upon the assertion of a purported cause of action under the Federal Employers Liability Act, she is entitled to have her case submitted to a jury, and that the courts have no power or authority to determine whether she has presented any evidence or proof in support of the cause. This so-called "*right*" is indeed one "*specially set up and claimed*" by the *petitioner* for it has no foundation in the law or in the decisions of this court.

There is no merit whatever in the petitioner's contention that her rights under the Seventh Amendment have been denied. The Seventh Amendment does not guarantee that the plaintiff's case shall be submitted to a jury when there is no evidence to sustain a verdict against the defendant. This court has consistently held that the directed verdict practice does offend any rights under the Seventh Amendment. *Galloway v. United States*, 319 U.S. 372; *Moore v. Chesapeake and Ohio R. Co.*, 340 U.S. 573. Here the Court of Appeals properly affirmed the directed verdict for the defendant because there was no evidence to support a finding for the plaintiff.

This court has always recognized, though the petitioner here does not, that there must be *some* judicial appraisal of the evidence to determine whether a jury question is presented. The function of the courts and the standards to be applied in making this appraisal in cases arising under the Federal Employers Liability Act are set forth in the recent opinion in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500. Subsequent decisions have consistently referred to the statement of these principles as given in the *Rogers* case. *Arnold v. Panhandle and Santa Fe R. Co.*, 353 U.S. 360; *McBride v. Toledo Terminal R. Co.*, 354 U.S. 517; *Gibson v. Thompson*, 355 U.S. 18.

There is no conflict between the decision of the Court of Appeals and the decisions of this court. On the contrary, the Court of Appeals has recognized and scrupulously followed the standards laid down in the *Rogers* case in its appraisal of the evidence presented by the petitioner.

2. The petitioner has not established a prima facie case under the Federal Employers Liability Act by showing that an occupant of defendant's labor camp, provided a safe means of ingress and egress, was found dead along the tracks on a non-working day.

In presenting evidence at the trial of this case, the petitioner proved only two things: (1) that the decedent set out to go fishing at about 4:30 A.M. on his day off, and (2) that his body was found on the tracks some seven hours later.

Petitioner has suggested certain theories as to what *might* have caused the death, such as a defective roadbed (burned out ties), a shoe caught under a tie-plate, and the failure of operating personnel to give warning (Petition p. 14).

There is no evidence or reasonable inference that any of these suggestions had any causal connection with the death. On the contrary, there is positive evidence that the shoe referred to was east of the body on the eastbound track, and a pair of shoes was seen near the body by the engineer of the train which discovered it. Furthermore, there is positive evidence that decedent was not seen alive on the track or in a position of peril by any of the train crews who were keeping a lookout.

We have then, a case in which positive and uncontradicted evidence of petitioner's own witnesses destroys any inference of fact favorable to her, thus leaving a complete

absence of probative facts necessary to establish liability. *Pennsylvania R. Co. v. Chamberlain,* 288 U.S. 333, 340; *Lavender v. Kurn,* 327 U.S. 645.

It should also be noted that there was no evidence that decedent was acting within the scope of his employment on the day of his death. He was not acting under orders when he left the camp to go fishing on his day off. He could have left the camp with safety on the roadway paralleling the tracks. How and why he was on the tracks, *if* that is where he met his death, is not established by the evidence.

If it can be said that he was furnished an unsafe place to work by reason of the defects complained of, it is enough to answer that (1) he was not working on the day of his death, and (2) that the requisite causal connection is absent. Mere speculation cannot do duty for probative facts. *Tennant v. Peoria & Pekin Union R. Co.,* 321 U.S. 29; *Moore, Admx. v. Chesapeake & Ohio R. Co.,* 340 U.S. 573.

The petitioner's whole case is simply and directly summarized in the Opinion of the Court of Appeals (Petition App. A. pp. vii, viii):

> "Plaintiff here wished to present to the jury the fact that decedent's body was found on defendant's main line in a mutilated condition and then hoped that through speculation, guesswork and inference the jury would find that the defendant through its negligence somehow ran down and killed decedent. What plaintiff refers to as 'positive evidence' amounts to nothing more than pure fantasy and contains even less substance than broth brewed from the bones of a starved pigeon. In short there is no proof, either evidentiary or from which any reasonable inferences could be drawn, of any negligence of the defendant whatsoever which could have played a part, even in the slightest, in producing the death of Floyd Brown."

CONCLUSION

The Court of Appeals has affirmed the directed verdict granted by the District Court because the proofs presented did not justify with reason the conclusion that negligence of the defendant played any part in the decedent's death. This decision is clearly correct and is not in conflict with any decision of this court.

The petition for certiorari should be denied.

Respectfully submitted,

CHARLES G. BOMBERGER,

JOHN L. ROGERS, JR.,

Counsel for Respondent.